

Pages 1 - 27

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

| | | |
|-------------------------|---|--------------------|
| HIQ LABS, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. C 17-03301 EMC |
| |) | |
| LINKEDIN CORP., |) | |
| |) | |
| Defendant. |) | |
| <hr/> | | |
| 3TAPS, INC., a Delaware |) | |
| Corporation, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. C 18-00855 EMC |
| |) | |
| LINKEDIN CORPORATION, a |) | |
| Delaware Corporation, |) | |
| |) | |
| Defendant. |) | |
| <hr/> | | |

San Francisco, California
Thursday, April 8, 2021

TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS

APPEARANCES VIA ZOOM:

For Plaintiff hiQ Labs, Inc.:

QUINN, EMANUEL, URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010

BY: RENITA N. SHARMA, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported Remotely By: Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official U.S. Reporter

APPEARANCES VIA ZOOM: (CONTINUED)

For Defendant:

ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, California 94105

BY: ANNETTE L. HURST, ATTORNEY AT LAW
RUSSELL P. COHEN, ATTORNEY AT LAW

Thursday - April 8, 2021

2:07 p.m.

P R O C E E D I N G S

---o0o---

THE CLERK: Calling Civil Action 17-3301, hiQ Labs, Inc. versus LinkedIn Corporation, related to Civil Action 18-855.

Counsel, please state your appearances for the record, beginning with counsel for plaintiff.

MS. SHARMA: Your Honor, Renita Sharma for plaintiff and counterclaim defendant hiQ Labs.

THE COURT: All right. Thank you, Ms. Sharma.

MS. HURST: Good afternoon, Your Honor. Annette Hurst on behalf of LinkedIn.

THE COURT: All right. Good afternoon, Ms. Hurst.

MR. COHEN: Good afternoon, Your Honor. Russell Cohen on behalf of the defendant LinkedIn.

THE COURT: All right. Thank you, Mr. Cohen.

Okay. I guess still no word from the Supreme Court on the cert petition in this matter?

MS. SHARMA: That's correct, Your Honor.

MS. HURST: That's correct.

THE COURT: And the *Van Buren* case, remind me. Has that been argued?

MS. HURST: It has been argued, Your Honor. The next currently known opinion release date is much later this month. I think it's the 22nd. So that would be the soonest next

1 opportunity, Your Honor.

2 **THE COURT:** And what's your best guess in terms of -- I
3 know it's been -- I guess it's been held over a couple of
4 times -- in terms of the cert petition in this matter? Is it
5 your guess that that may be held pending *Van Buren*, or what do
6 you think's -- what's your assessment?

7 **MS. HURST:** Yeah. Our assumption is, Your Honor, even
8 though no order issued saying it was being held pending
9 *Van Buren*, that that's, in fact, what's been happening.

10 **THE COURT:** Okay. Well, I mean, we could sort of get into
11 it and talk about sort of what's left after the Ninth Circuit's
12 decision and what's new here that would suggest there is a
13 claim under the CFAA; but it seems to me that it may make sense
14 to -- let's wait and see what the Court does. I'm disinclined
15 to try to issue any definitive ruling yet without knowing
16 what's going to happen.

17 Unless somebody sees a good reason for the Court to
18 venture down this road right now, I don't, but I'll hear a
19 contrary view if there is one.

20 **MS. HURST:** Well, Your Honor, I think that LinkedIn would
21 like to get its claims at issue so that if and when, you know,
22 there -- I believe the terms of the current stay are that once
23 the petition is acted upon, there's ten days to have initial
24 disclosures. And, you know, Your Honor, if the claims are at
25 issue, then, of course, the scope of that will be known at that

1 time, rather than just letting the counterclaims be sitting out
2 there.

3 Of course, Your Honor, it is also our view that the Court
4 should not dismiss the CFAA claims.

5 But, of course, there are all the state law claims as well
6 that we've really never even had an opportunity to address,
7 Your Honor, and so we are prepared to address those as well in
8 our argument.

9 **THE COURT:** Sure. I mean, that's the point. I start with
10 the Ninth Circuit's decision, which didn't definitively rule;
11 but certainly, there's a lot there that suggests that unless
12 there's some new facts, that the CFAA claim would not survive.
13 But that could change depending on what the Supreme Court does
14 in either of these cases, I assume. That's why I'm reluctant.

15 I mean, frankly, if there were no appeal and we were sort
16 of here without the cert petition and without *Van Buren*,
17 I guess I would press you pretty hard, Ms. Hurst, as to why I
18 should sort of turn the tide here. And maybe you have some
19 nuances here that you would want to push. But I'm inclined to
20 really analyze this once the law is in.

21 Do you have a different view, Ms. Sharma?

22 **MS. SHARMA:** No, Your Honor. I think if the Court is
23 prepared to stay its decision until the Supreme Court rules on
24 *Van Buren* and the cert petition, we're comfortable with that.
25 As Ms. Hurst said, discovery is stayed in the matter pending

1 those things anyway. So it probably won't impact the
2 proceeding of the case.

3 Obviously, if, you know, LinkedIn wants a dispositive
4 ruling that its CFAA claim survives under the current law,
5 that, I think, we would have some issue with because we think
6 that the current state of the Ninth Circuit's ruling, as you
7 indicated, really mandates the dismissal of the claim.

8 But if we're merely speaking about a stay until the
9 Supreme Court decides, we don't have any objection to that.

10 **THE COURT:** Well, let me tell you where I'm sort of
11 headed. I mean, I think the 502 claim under the Penal Code --
12 I understand it's different. There's a distinction between the
13 CFAA and 502. But I also believe that what may or may not be
14 said by the Supreme Court might have some influence on the
15 502 question as well. And they're sort of somewhat parallel in
16 some ways, and some of the policy arguments overlap to a
17 certain degree. I am inclined to put those on hold until we
18 get some resolution from the Supreme Court.

19 I am prepared to address the breach of contract, the
20 misappropriation, the unjust -- the trespass claim here. And
21 so what I'd like to do is -- because I think they can be looked
22 at perhaps independent of the CFAA and the 502 claim to a
23 certain extent. So I'd like to spend the next few moments
24 talking about that, talking about those claims.

25 So let's start with the breach of contract claim here. It

1 seems to me the key is whether the user agreement -- which
2 states it applies to anybody who uses the website, not just to
3 subscribers -- whether that applies here, turns on the question
4 of knowledge.

5 This is not a clickwrap but something closer to a
6 browsewrap, and I think Ninth Circuit law makes the validity,
7 in application of a browsewrap contract, turn on whether
8 there's actual or constructive knowledge. And it seems to me
9 that that is a fact-based question that would not be
10 appropriate to resolve; and therefore, my inclination is to say
11 that action at least has been stated for 12(b)(6) purposes,
12 without prejudice to factual development and perhaps revisiting
13 the merits of this question on a summary judgment or in some
14 other context.

15 So I'll put the burden on you, Ms. Sharma. Why isn't this
16 at least a question that's more of a fact-based question about
17 the binding nature of the alleged user agreement?

18 **MS. SHARMA:** Understood, Your Honor.

19 I think it's important, for this particular cause of
20 action, to know that hiQ is only moving to dismiss or strike
21 this claim in part.

22 So the claim alleges that hiQ violated the user agreement
23 from the outset of its access to LinkedIn and, also, that that
24 violation continues to this day. LinkedIn seeks injunctive
25 relief in part because hiQ continues to breach the user

1 agreement by accessing LinkedIn in violation of the terms of
2 service.

3 It's that portion, the continuing portion, that we're
4 seeking to strike. And the basis for that motion to strike is
5 that the ruling -- it's the ruling of this Court, as affirmed
6 by the Ninth Circuit. Both courts held that hiQ is no longer
7 bound by the user agreement as LinkedIn has terminated hiQ's
8 status. And so we think from the time of that ruling forward,
9 the claim should be struck.

10 I understand from the briefing that LinkedIn argues that
11 those citations and statements in the two rulings are not the
12 law of the case because, firstly, that rulings on the issue of
13 a preliminary injunction are not binding as to issues of fact.

14 As to that, Your Honor, we would say that it's black
15 letter law that whether a certain or undisputed statement of
16 facts establishes a contract is a question of law. That's not
17 a question of fact.

18 And what this Court considered and what the Ninth Circuit
19 considered is whether continued access by hiQ after the Court's
20 ruling and after LinkedIn had terminated hiQ's user status
21 established a contract. And the answer of both this Court and
22 the Ninth Circuit was no, that hiQ is no longer bound.

23 The second basis that LinkedIn articulates for deviating
24 from the ruling of this Court is that there are changed
25 circumstances present now. And what they've said is that hiQ

1 has made the, quote, admission that it continues to access
2 LinkedIn data.

3 That's not a changed circumstance, Your Honor. That was
4 the whole point of the preliminary injunction. What hiQ sought
5 before this Court was the right to continue to access
6 LinkedIn's data. So to point to that as the only changed
7 circumstance here, I think, shows why we think this claim can
8 be struck from the point of the preliminary injunction ruling
9 on.

10 **THE COURT:** All right. Your response, Ms. Hurst?

11 **MS. HURST:** Yes, Your Honor. The question of whether the
12 contract is terminated is a question of fact, and it was not
13 terminated. And the pleading alleges that the contract is
14 continuing in effect. And for purposes of Rule 12, it's that
15 allegation that must be taken as true.

16 Your Honor, facts outside the pleadings that are not
17 judicially noticeable cannot be considered without converting
18 this to a Rule 56 motion for summary judgment, and the Court
19 should not do that because the preliminary injunction record
20 was not complete on this question.

21 The fact of the matter is, Your Honor, LinkedIn never
22 terminated the contract. It never even terminated hiQ's member
23 status. It only restricted hiQ's member status.

24 But in all events, as the Court noted in its preliminary
25 comments, this contract governs both members and visitors. So

1 even if hiQ's status as a member had been terminated -- which
2 it was not and which is contrary to the allegations of the
3 counterclaim -- the agreement would still govern hiQ's actions
4 as a visitor by its express term.

5 In paragraphs 36 to 46 of the counterclaim, Your Honor,
6 LinkedIn alleges in detail all of the steps that were taken
7 by -- over time by hiQ that show its actual knowledge of and
8 assent to the terms of that contract, the one that makes a
9 distinction between members and visitors and imposes
10 obligations on visitors as well as members. This was not only
11 by virtue of their scraping and continued access, which would
12 be sufficient under the *Nguyen* case, Your Honor, but also by
13 express agreement with a variety of other contractual
14 relationships they entered into with LinkedIn that expressly
15 relied upon and incorporated these terms of use. So there was
16 clearly actual knowledge, Your Honor.

17 The allegation is that the contractual obligations are
18 continuing. Termination is a question of fact. This Court did
19 not previously purport to dispose of a contract claim that had
20 not even yet been pled, Your Honor, nor did the Ninth Circuit.
21 The Ninth Circuit clearly said that it's not expressing any
22 views on the merits of the state law claims in its opinion.

23 So, Your Honor, this claim should proceed.

24 **THE COURT:** All right. Thank you.

25 Let me address the misappropriation claim here. It

1 appears to me that a question of whether there are property
2 rights is one that, you know, we look to California precedent
3 here. And there is a fair argument, at least under the
4 *International News* case, that there is at least a
5 quasi-property interest, even in just the information-gathering
6 process here and even if it's public information, such as news.
7 And that suggests to me that there's enough there at least,
8 again, to get by on a 12(b)(6) motion.

9 And as far as preemption, CUTSA preemption, here, there's
10 no claim that the public information, the public profiles are
11 confidential or generally not known to the public. So that's
12 hard to find in preemption here.

13 So that's my initial take, but, again, I'll let you
14 comment on that, Ms. Sharma.

15 **MS. SHARMA:** Thank you, Your Honor.

16 Regarding the "hot-news" test, I would say that there
17 are -- it's a five-part test under the Second Circuit's *NBA*
18 precedent, which was applied by -- in the *Polestar* case that
19 LinkedIn itself cites. We don't think that LinkedIn meets the
20 standard under the *NBA* test for two reasons.

21 One is that that standard requires that the defendant be
22 in direct competition with a product or service offered by the
23 plaintiff. That's simply not what happened here. HiQ is not,
24 as *Polestar* was, an entity that is copying and replicating
25 exactly what the plaintiff in that case did. HiQ takes data

1 that is owned by LinkedIn's users, according to LinkedIn's own
2 user agreement. It incorporates that data into its own product
3 and creates something new. It is not in direct competition
4 with LinkedIn for these purposes. So we don't think this
5 qualifies under that prong of the "hot-news" test.

6 **THE COURT:** What about -- I mean, part of your theory is
7 that there is competition, at least in terms of the product,
8 the end product. That's your theory. That's your antitrust
9 theory. That's your unfair practice theory. Is that
10 consistent with arguing that they're not in direct competition?

11 **MS. SHARMA:** I think it is, Your Honor, and the reason is
12 that there is competition with a derivative product of
13 LinkedIn's, the product that they've created to mimic what hiQ
14 did.

15 But what they're alleging that we are copying is the
16 underlying source data that both entities use to create that.
17 And LinkedIn has not cited any case where "hot news" is applied
18 because the competition between the parties is in a derivative
19 element, in a derivative product that is built upon that hot
20 news. That's an extension of the "hot-news" doctrine that
21 hasn't been done, at least that we have seen in the case law.
22 And so we think that's the distinction here; that "hot news"
23 might be appropriate if we were simply copying and republishing
24 the data as a competitive professional networking site, but
25 that's not what LinkedIn -- that's not what hiQ does.

1 **THE COURT:** So the direct competition is a requirement,
2 even though, generally, it is not an essential element of the
3 misappropriation claim pursuant to the *USGA* case. You're
4 saying because it's a "hot news" subset of misappropriation,
5 that direct competition is required?

6 **MS. SHARMA:** Yes, Your Honor. And that comes from the
7 *Polestar* case that LinkedIn cites. That's a California case
8 applying common law misappropriation under California law. And
9 it applies the *NBA* standard from the Second Circuit to
10 determine whether or not this applies.

11 **THE COURT:** Okay. Why else?

12 **MS. SHARMA:** The second element of the test that we don't
13 think is met is that LinkedIn would need to show that the
14 ability of hiQ to, quote/unquote, free ride on LinkedIn's
15 efforts would so reduce the incentive to produce LinkedIn's
16 product, that the existence or quality of that product would be
17 substantially threatened.

18 And we don't see an allegation in the complaint that
19 LinkedIn says its incentive to produce its product is being
20 threatened. It makes allegations about the costs of limiting
21 automated scraping access, but not to the extent needed, we
22 think, to establish a "hot-news" exception.

23 **THE COURT:** Okay. Go on.

24 **MS. SHARMA:** Those are the two bases under the "hot-news"
25 test, Your Honor.

1 **THE COURT:** All right. And what's your response,
2 Ms. Hurst?

3 **MS. HURST:** Your Honor, the *Polestar* case does not discuss
4 or acknowledge the *USGA* case. It doesn't purport to reinject
5 an element of direct competition to the California
6 misappropriation court, which *USGA* clearly says is not present.
7 Your Honor, it's simply not an element of the common law
8 misappropriation tort.

9 However, I do have to say, Your Honor, if hiQ is saying
10 that there is no competition between the parties, then the
11 injunction should be dissolved, because the basis for that
12 injunction was an unfair competition claim.

13 **THE COURT:** All right. And what about the free ride
14 issue?

15 **MS. HURST:** Your Honor, clearly, the free riding
16 requisites have been alleged here. LinkedIn has alleged
17 substantial time, effort, and investment. It has alleged the
18 acquisition of the quasi-property interest through the
19 development of the aggregation of data. It fosters that
20 aggregation of data in the same way that International News
21 did.

22 And, Your Honor, in fact, with respect to the free riding,
23 it is on the timing of the changes, for example, in the Keeper
24 product, where hiQ is exploiting the timeliness of changes in
25 data. All of these elements are met, Your Honor.

1 **THE COURT:** But what about the argument that it's got to
2 be such a disincentive that it -- I don't know the exact
3 words but -- impacts on LinkedIn's business in a way that -- I
4 don't know if you use the word "material" or "substantial," but
5 something along those lines?

6 **MS. HURST:** Your Honor, that's the Second Circuit test
7 that they're citing which simply has not been incorporated
8 anywhere into California law.

9 The elements under California law do not require that sort
10 of, you know, disincentive as part of the tort, as expressed in
11 the *USGA* case. Your Honor, it simply requires the plaintiff to
12 establish injury, and there is both actual and threatened
13 injury here from the conduct of hiQ and those of its ilk.

14 **MS. SHARMA:** Your Honor, may I respond to that briefly?

15 **THE COURT:** Yeah, briefly, mm-hmm.

16 **MS. SHARMA:** Just to pick back up on the competition
17 element, hiQ is obviously not backing away from its allegations
18 regarding the basis for LinkedIn's conduct, which we do think
19 is because they were attempting to compete with the derivative
20 product that hiQ created.

21 All I simply want to point out with respect to the *NBA*
22 test is that it's a very limited exception. The "hot-news"
23 test is meant to only pick up and extend protection to a very
24 particular subset of publicly available data that should be
25 accorded protection.

1 And one of the ways to limit the scope of that protection
2 that the Second Circuit has held and that *Polestar* applied in
3 California is that there does need to be competition with the
4 product that is being allegedly misappropriated. And there, in
5 *Polestar* and in the *NBA*, it was a product that was being
6 wholesale copied and replicated, exactly the same form and
7 method that it was being produced by the plaintiff. In
8 *Polestar*, it was concert listings that were being picked up,
9 copied, and republished on a website. That's the distinction
10 we're trying to draw; that that is not what is happening when
11 hiQ accesses the data of LinkedIn.

12 **THE COURT:** Well, that essentially, as I think I said at
13 the outset, that this is a sort of "hot news" enclave of
14 misappropriation law.

15 **MS. SHARMA:** Yes, that's correct, Your Honor. Thank you.

16 **THE COURT:** Let me ask about trespass.

17 The kind of injury that is typically required in these
18 kinds of cases is some burdening of the infrastructure servers
19 in a way that really burdens performance. So it's not just the
20 expense of anticipating the need for defensive mechanisms, it
21 seems to me, but whether there's actually some loss of
22 performance here.

23 And are there allegations specific -- what are the
24 specific allegations here that would fit into that kind of
25 arena?

1 **MS. HURST:** Your Honor, that's really not the test under
2 *Thrifty-Tel* and *Intel v. Hamidi*, if I may address that point
3 first.

4 **THE COURT:** Yes.

5 **MS. HURST:** Your Honor, in *Thrifty-Tel*, there were two
6 different allegations of hacking. The first involved using a
7 long-distance phone system for an instance of 23 and
8 16 minutes. So all they did was make some long-distance calls,
9 Your Honor. The second episode of hacking involved
10 overburdening the system.

11 Ultimately, the Court in that case held that the second
12 episode of hacking would not give rise to relief because the
13 plaintiff had failed to mitigate. And so the case went to
14 judgment solely on 40 minutes of long-distance telephone calls
15 without any evidence of interference in the system. That's
16 *Thrifty-Tel*, Your Honor.

17 **THE COURT:** But that's using -- I mean, it feels different
18 because that's, like -- I know there's a question of whether
19 you're actually using and interfacing with a server or not.
20 But it seems to me that that is a pretty deep intrusion.

21 **MS. HURST:** Well, Your Honor, not really. In that case,
22 all they did was spoof a six-digit code in order to hook up to
23 the system and then place a long-distance phone call. So, you
24 know --

25 **THE COURT:** But it went into *Thrifty-Tel*'s computerized

1 switching system. It wasn't a -- it seemed to me it was a
2 deeper intrusion into Thrifty-Tel's computerized switching
3 system than what we're talking about here.

4 **MS. HURST:** Well, Your Honor, I mean, if you look at the
5 facts of the cases discussed, in *Intel v. Hamidi*, we've got
6 CompuServe, where it was a spammer, but the individual spammer
7 was not overburdening the system; we've got *eBay*, where it was
8 a scraper, but the individual scraper was not overburdening the
9 system; we've got *Register.com*, where it was a scraper, but the
10 individual scraper was not overburdening the system.

11 And in that -- in all of those cases, courts held,
12 including this Court in the *Bidder's Edge* case, that the
13 automated data collection could have, especially if replicated
14 by other searchers, had deleterious impact on the equipment.

15 Now, Your Honor, the reason that the *Ticketmaster* case
16 went the other way was because the Court in that case held
17 there wasn't -- there weren't likely to be any follow-on.
18 There weren't likely to be any other scrapers because that was
19 such a limited market. And so in *Ticketmaster*, the plaintiff
20 was unable to show that threatened harm from replication.

21 So the ultimate holding in *Hamidi*, Your Honor, at 1356, is
22 *Hamidi* is unable to show appreciable effect on the operation of
23 its computer system, nor any likelihood that *Hamidi*'s actions
24 will be replicated by others if found not to constitute a
25 trespass.

1 So, Your Honor, in these computer trespass situations,
2 it's quite clear that it is sufficient to allege that this is
3 the kind of activity that has been and will be replicated by
4 others and that the total -- the total sum of that kind of
5 activity is deleterious on the system.

6 And, Your Honor, it is deleterious because LinkedIn and
7 others like it have to invest quite a lot in capital and
8 operating expenses in order to parry this kind of activity and
9 to stay on top of it.

10 And the standard is not that you have to anticipate the
11 arms race and buy nuclear weapons for the end point in order to
12 stop it from happening. That's not the standard for injury
13 here, Your Honor. It can be actual or threatened injury. And
14 there is clearly threatened injury from replication.

15 But, Your Honor, I will say this as well. We know that
16 hiQ is scraping, and we know that that's placing some burden on
17 LinkedIn's platform. What we don't know is the quantum of that
18 because we haven't had discovery yet.

19 And, Your Honor, if we have discovery and we find out how
20 much scraping they've done, then we will be able to quantify
21 the marginal effect of that on LinkedIn's system and the
22 portion of LinkedIn's investment that is attributable to hiQ's
23 activities.

24 So, Your Honor, we think it's sufficient to allege the
25 threatened injury from replication. It's clearly part of the

1 holding in *Intel v. Hamidi*; the *CompuServe* and *eBay*,
2 *Bidder's Edge* and *Register.com* cases.

3 Your Honor, but even without that, there's an allegation
4 of scraping from hiQ and increased marginal costs that LinkedIn
5 has incurred as a result of scraping; and the fact that we
6 can't quantify that, Your Honor, at this early point under
7 Rules 8 and 12 is not a reason to dismiss the claim.

8 **THE COURT:** Is there an allegation, a specific allegation
9 that the infrastructure is -- the servers are slowed down, that
10 there actually is a difference in performance because of these
11 scraping operations?

12 **MS. HURST:** Your Honor, there's an allegation that
13 LinkedIn has had to put on additional equipment, additional
14 bandwidth; that it's hired an entire team of people; that it
15 has developed multiple different types of software and
16 specialized technical tools.

17 And, Your Honor, the allegation is the current volume --
18 and this is in paragraph 83 -- the current volume of bot
19 requests could easily impair the ability of many websites that
20 do not invest as much in their infrastructure as LinkedIn does.

21 Your Honor, the trespass tort is not only available to big
22 companies who can afford to invest. Trespass is not a claim
23 that's only available to someone who owns a mansion trying to
24 prevent trespassers, and not to someone who owns a small
25 apartment or a small cottage or bungalow.

1 **THE COURT:** Well --

2 **MS. HURST:** It's available to everyone, Your Honor.

3 **THE COURT:** Well, actually, your argument kind of goes the
4 other way; that it's the small operations that don't have the
5 ability to counter the nuclear race with anti-bot stuff that
6 gets easily impaired and clogged up. So there, it'd be easier
7 to prove. Right? You don't need a whole lot of activity to
8 result in either denial of services or a slowdown of services.

9 My question is: Is there something here -- is this --
10 what happens? I guess I don't know enough about this process.
11 But when there is what you call a scraper, how does that
12 actually impact the infrastructure?

13 **MS. HURST:** Well, Your Honor, what the scraper or the bot
14 does is it presents a lot of requests in a very short period of
15 time, and those requests then have to be fulfilled by the
16 servers. And the fulfillment of those requests does place a
17 burden on the servers in order to satisfy -- either to satisfy
18 the request or make an assessment that it's not a request that
19 should be satisfied, because it's an unauthorized request for
20 access, and it should be turned away.

21 So, Your Honor, the only way that LinkedIn avoids that
22 impairing the operation of its website on an ongoing basis is
23 by making huge marginal investments.

24 **THE COURT:** All right. So --

25 **MS. HURST:** And, Your Honor --

1 **THE COURT:** -- it is in the form of access requests, a
2 huge number of access requests that presents the threat?

3 **MS. HURST:** That's correct, Your Honor.

4 **THE COURT:** And then you have to block those in order to
5 preserve the resources?

6 **MS. HURST:** Correct.

7 **THE COURT:** All right. So let me ask you, Ms. Sharma.
8 Why isn't that enough, again, at least for 12(b)(6) purposes?

9 **MS. SHARMA:** First, Your Honor, I'd point to the fact that
10 nothing in the complaint actually says that it is the attacks
11 on LinkedIn that is causing the impairment of the property;
12 here, the servers. There's no allegation in the complaint that
13 it's the attacks on the servers that slow the servers down.

14 What the allegation in the complaint is, is that LinkedIn
15 is preventing tremendous -- is expending a tremendous amount of
16 resources blocking that access; and therefore, they've sort of
17 manufactured their own harm. I think there's two problems with
18 that.

19 **THE COURT:** Well, but isn't that obvious, that if they
20 don't block it -- isn't that what a bot does, is it creates and
21 manufactures access requests? Is that in doubt?

22 **MS. SHARMA:** No, Your Honor.

23 But I think if you look at the *Hamidi* case, it explains
24 why LinkedIn's claim is insufficient. In *Hamidi*, a former
25 employee used Intel's servers to send messages to Intel's

1 employees. So there was some intrusion on the server. There
2 was some use of the server's capacity. And the Court in *Hamidi*
3 found that that was insufficient because the server was being
4 used in the exact method that it was intended to be used -- it
5 was being used to funnel e-mail traffic -- and that,
6 thereafter, that wasn't a harm.

7 So Intel fell back and said, okay, the harm that they
8 claimed was consequential economic damages; i.e., the loss of
9 productivity of their employees and company efforts to block
10 messages.

11 That's exactly what LinkedIn is saying here, is that the
12 harm isn't the harm; the harm is what we're doing to prevent
13 the harm.

14 **THE COURT:** Well, but there's -- yeah, is it individual?
15 Mr. Hamidi was doing something on an individual basis. Here,
16 the claim is that this is in a much larger context; that not
17 only that, it's capable of replication by others because -- it
18 seems to me that's exactly the difference.

19 It's not just an individual trying to get at certain data
20 and use certain data addresses to e-mail perhaps unsolicited
21 letters or e-mails and this sort of thing. This is on a mass
22 basis. That's the allegation here. And the scraping is on a
23 systemic basis. So it seems to me that's the difference.

24 **MS. SHARMA:** That's fair, Your Honor, but that's not the
25 distinction that *Intel* drew. What *Intel* said was that

1 consequential damage simply isn't an injury; that if access
2 itself had overburdened the system and, quote, made the entire
3 system harder to use, that might be a harm; but a consequential
4 damage -- and the *Intel* case didn't speak about the scope of
5 that damage -- can't constitute a harm because it effectively
6 allows the defendants to sort of manufacture their own damage.

7 In terms of the question of aggregating follow-on harm
8 entirely with regard to *eBay*, what *Hamidi* says about that is,
9 they summarize the standard of the *eBay* case as being
10 (reading):

11 ". . . defendant's use of the plaintiff's
12 computer . . . was held sufficient to support an
13 action for trespass when it actually did, or
14 threatened to, interfere with the intended
15 functioning of the system"

16 And that's from page 1356.

17 We think here there's simply no allegation in the
18 complaint that what hiQ did impacted the system.

19 And I'll just add one more thing. Ms. Hurst said that
20 LinkedIn can't articulate or quantify the quantity of harm that
21 they're suffering from hiQ because they haven't yet obtained
22 discovery.

23 They have said in their motion to dismiss -- and,
24 you know, we have correspondence between the parties about
25 this -- that there is a whitelist that LinkedIn has maintained

1 since the PI, and that whitelist has a list of all IP addresses
2 used by hiQ.

3 So to the extent that LinkedIn needs to quantify the level
4 of scraping, it has a list of the IP addresses that have been
5 used. It can simply pull them. There's nothing preventing
6 that. And there's no allegation in the complaint that LinkedIn
7 has done that sort of basic work.

8 **THE COURT:** All right. I'll give you the last word, since
9 it's your motion, Ms. Hurst.

10 **MS. HURST:** Yeah. Your Honor, we certainly weren't
11 operating under a whitelist prior to the time of the
12 injunction. So all of the activity that hiQ engaged in at that
13 time, which is part of this claim, is unknown in its exact
14 contours.

15 But, Your Honor, *Intel v. Hamidi* is clear that it's the
16 threatened injury from replication that is sufficient to state
17 this claim.

18 And, Your Honor, this consequential damages analysis
19 Ms. Sharma is proposing is not the analysis of *Hamidi* with
20 respect to burdening on the system. It's the analysis of
21 *Hamidi* with respect to the content of the e-mails there.

22 The Court will recall that the content of the e-mails was
23 highly disruptive. It's critical of Intel's human resources
24 function and its policies.

25 And it was with respect to the content of the e-mails that

1 the Court said: We're not going to let that disruption, that
2 consequential disruption and the efforts to stop it from
3 happening, become part of the claim.

4 And that was for obvious reasons there because, you know,
5 the communicative aspects of the e-mails were what were at
6 issue in that part of the analysis.

7 That's not the case here, Your Honor. We're talking
8 about, as alleged in paragraph 83, automated scrapers taken in
9 the aggregate, placing a substantial burden on LinkedIn's
10 infrastructure reaching, at present, into hundreds of millions
11 of blocked access requests per day. That is a cognizable
12 trespass claim, Your Honor.

13 **THE COURT:** All right. I will take the matter under
14 submission. As I indicated, my intent is to rule on those
15 state claims that we talked about.

16 But the question of the CFAA and the 502, I'm probably
17 going to not issue any decision yet and will await word from
18 the Supreme Court.

19 But to move things along, I will rule on these three.

20 So let's talk for a moment about -- do we have any case
21 management issues that we need to talk about?

22 **MS. SHARMA:** Not from the perspective of plaintiffs,
23 Your Honor.

24 **THE COURT:** All right.

25 **MS. HURST:** No, Your Honor. Thank you.

1 **THE COURT:** All right. Well, in light of the stipulated
2 stay, I guess we'll just have to wait and see. We'll have more
3 to talk about when the Supreme Court acts.

4 Thank you. I'll take the matter under submission.

5 **MS. SHARMA:** Thank you, Your Honor.

6 **MS. HURST:** Thank you, Your Honor.

7 (Proceedings adjourned at 2:45 p.m.)

8 ---o0o---

9
10 **CERTIFICATE OF REPORTER**

11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled matter.

13
14 DATE: Monday, July 26, 2021

15 *Ana Dub*
16 _____

17 Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
18 Official United States Reporter
19
20
21
22
23
24
25